

Report and Recommendation

Prepared for Jackson City School District

Concerning Complaints from the Freedom From Religion Foundation and
the American Civil Liberties Union of Ohio

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I. Report

The purpose of this report is to investigate the origins and legal status of the portrait of Jesus (“the Portrait”) hanging in Jackson Middle School. The impetus stems from two letters that the Jackson City School District received last month. On January 2, 2013, the Freedom From Religion Foundation (FFRF), a Madison, Wisconsin, based organization, sent a letter expressing concern about the Portrait. The FFRF requested that the Jackson City School District “commence an immediate investigation into this allegation and take the appropriate and necessary steps to bring Jackson Middle School into compliance with the Constitution.” Shortly thereafter, on January 10, 2013, the American Civil Liberties Union (ACLU) of Ohio sent a similar letter “suggest[ing] that the portrait be removed or the display altered so that it may better reflect the diversity in the community.”

Counsel representing Jackson City School District responded to each organization by letter on January 11, 2013, promising to conduct an investigation by March 20. Subsequently, on January 15, 2013, counsel for Jackson City School District estimated that the investigation would be complete by February.

A. Scope of Investigation

In the course of investigating this matter, we inspected the portrait and surrounding facilities; interviewed Jackson City Schools staff and alumni; retained a local area historian; and examined Jackson High School yearbooks (the “Osky Wow”), ranging from the 1940s to the present. On January 15, 2013, we offered to meet with each organization and their clients to give them an opportunity to have input in the investigation. Neither organization responded to the offer.

B. Factual Background

The Portrait was hung by the Jackson High School Hi-Y Club in then-Jackson High School in 1947. (Interview with Clarence Rice, January 15, 2013.) The frame around the Portrait bears the simple inscription, “Hi-Y Club.” Founded in 1925, the Jackson High School Hi-Y Club is the oldest club in the school. (1947 Osky Wow.) Affiliated with the Young Men’s Christian Association (YMCA), its purpose is “[t]o create, maintain, and extend throughout the school and community high standards of Christian character.” (1947 Osky Wow; 1946 Osky Wow.) Throughout its existence, the Hi-Y Club has been active in Jackson High School, including having a booth on the football field, holding dinners, and sponsoring a spring formal. (1947 Osky Wow.) As early as 1947, the yearbook noted that “[t]hese things have been traditional for many years.” (1947 Osky Wow.) Its sister organization is the “Tri-Hi-Y Club,” formerly the “Girl Reserves” or the “Teen-Y.” (1969 Osky Wow; 1946 Osky Wow; 1947 Osky Wow.) Both the Hi-Y Club and the Tri-Hi-Club are still closely affiliated and active today at Jackson High School.

The Hi-Y Club, and its sister organization, the Tri-Hi-Y Club, appear to identify their purpose and mission closely with the Portrait by regularly posing with the same (or an otherwise identical) Portrait for the Jackson High School yearbook on multiple occasions. (1969 Osky Wow; 1971 Osky Wow.) The Portrait was hung shortly after standout Jackson High School student and Hi-Y member Frank Rice died of leukemia. (1947 Osky Wow.)

As evidenced by various pictures in the Jackson High School yearbook, the Portrait has remained in the same place since 1947. (1970 Osky Wow; 1974 Osky Wow.) The inscription on the frame does not identify the Portrait as a gift or donation to the school. There is no record of title to the Portrait ever being transferred to Jackson High School or Jackson City School District, nor does the District presently claim ownership over the Portrait. The Portrait itself

suggests that it was paid for by the Hi-Y Club, and there is no indication that Jackson City School District paid for the Portrait. On February 12, 2013, counsel representing the Hi-Y Club sent the School District a letter asserting the Hi-Y Club’s “continuing interest in having the Club’s portrait remain in the lobby” and the Club’s belief that “removal of the portrait would constitute an unconstitutional act of censorship against the Club’s private speech based upon its religious viewpoint in an otherwise open forum.”

In 1986, Jackson High School formally created a “Hall of Honor” with pictures of distinguished alumni near the Portrait. (1999 Hall of Honor Program.) In 2004, Jackson City built a new building for the high school, and Jackson Middle School occupied the former Jackson High School. Throughout, the Portrait and the other Hall of Honor pictures remained in place.

C. Analysis

The threshold issue to determine with regard to the Portrait is whether the Portrait is government speech or private speech. If the Portrait is government speech, then the Portrait must be analyzed pursuant to Supreme Court precedent governing the current interpretation of the Establishment Clause. If the Portrait is private student speech, and not government speech, then the Establishment Clause does not apply. Instead, private student speech is protected by the First Amendment. The Complainants are asking the District to remove the Portrait because of its religious content and viewpoint. If the Portrait is private speech, then any action by the District took to remove the Portrait because of its religious content and viewpoint could violate student free speech rights. Accordingly, Jackson City School District must act carefully here to avoid the Scylla of an Establishment Clause violation and the Charybdis of trampling on student speech. *See, e.g., Pounds v. Katy Independent School Dist.*, 730 F. Supp. 2d 636, 638 (S.D. Tex. 2010) (“This case again requires analysis of the delicate balance that public school

administrators must strike between protecting the First Amendment right to free speech and avoiding endorsing religion in violation of the Establishment Clause.”).

1. Establishment Clause

Under the Establishment Clause of the First Amendment, the government cannot endorse religion. *See Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring). This includes a government sponsored display of a picture of Jesus in a public school. *Washegesic v. Bloomingdale Pub. Schs.*, 813 F. Supp. 559, 566 (W.D. Mich. 1993). The Establishment Clause, however, only applies to government speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995); *Bd. of Educ. of Westside Cnty Schs. (Dist. 66) v. Mergens*, 494 U.S. 226, 250 (1990) (“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”).

As a general rule, the government “is entitled to say what it wishes, and to select the views that it wants to express.” *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–68 (2009) (internal citations omitted); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005) (holding that the government has broad leeway to adopt speech as its own). The power to select necessarily includes the power to disclaim. *See Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (noting that the government explicitly disclaimed the speech at issue).

The Portrait is not government speech. Nothing in the course of this investigation indicates that Jackson City School District owns the Portrait. The frame around the portrait identifies it as belonging to the “Hi-Y Club.” Throughout the past sixty years, the Hi-Y Club, and its sister organization, have closely affiliated themselves with the Portrait. And the Hi-Y Club has asserted ownership over the Portrait. Jackson City School District does not dispute this

assertion. The School District has no record of ever owning the Portrait. Moreover, in contrast to the 1986 establishment of the “Hall of Honor,” the Jackson City School District never took equivalent, affirmative steps to claim ownership or take control of the Portrait.

Additionally, Jackson City School District now affirmatively disavows ownership. Given the broad power government has to adopt, or disclaim, speech, Jackson City School District is within its right to disclaim the Portrait and the speech it represents. Whatever uncertainty may have existed in the past, there is no uncertainty now that Jackson City School District has asserted that it is not speaking through the Portrait.

2. Free Speech Clause

Under the Free Speech Clause of the First Amendment, the government cannot discriminate against private religious speech, even in the interest of avoiding the appearance of an Establishment Clause violation. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12, 113 (2001); *see also Pinette*, 515 U.S. at 760 (“Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”) (citations omitted). While free speech rights enjoy some protection even in non-public fora, *see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985), free speech rights enjoy greater protections in traditional public fora or government created limited public fora. The government can create a limited public forum by longstanding practice. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *see also Kincaid v. Gibson*, 236 F.3d 342, 348–49 (6th Cir. 2001) (*en banc*); *id.* at 351 (examining the “actual practice to determine whether [the government] truly intended to create a limited public forum”). And a limited public forum can exist for specific types of speakers, such as student-clubs at a given school. *See Hazelwood Sch. Dist.*, 484 U.S. at 267 (same); *see also Kincaid*, 236 F.3d at 348–49; *id.* at 352–53 (holding that the government can

create limited public forum for certain speakers). Once a limited public forum is created, then the school must respect the rights of similarly situated speakers. The school can adopt narrowly tailored, content-neutral time, place, and manner restrictions, *Kincaid*, 236 F.3d at 348, but it cannot engage in viewpoint discrimination, *Good News Club*, 533 U.S. at 112. In secondary school context, however, school authorities may also prohibit speech that is lewd or obscene, age inappropriate, or advocates criminal behavior. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

By allowing the Hi-Y Club to display the Portrait for over sixty years in Jackson High School (and later Jackson Middle School), the Jackson City School District appears to have created, by longstanding practice, a limited public forum for student groups to hang portraits of inspirational figures. Other than allowing the Hi-Y Club to hang the portrait in 1947, there is no indication that Jackson City School District ever actively exercised any sort of control over the Portrait.

The fact that only the Hi-Y Club has so far taken advantage of this limited public forum does not necessarily change this analysis. In *Kincaid*, the Sixth Circuit, sitting *en banc*, found that Kentucky State University created a limited public forum for student yearbook editors despite the fact that only one student was actively involved as an editor. See *Kincaid*, 236 F.3d at 354 (finding the creation of a limited public forum by longstanding practice); *id.* at 345 (“Coffer served as the editor of the yearbook during the 1993-94 academic year. Although a student-photographer and at least one other student assisted her at one point, Coffer organized and put together the yearbook herself after her staff members lost interest in the project.”). Likewise, Jackson City School District appears to have created a limited public forum that only the Hi-Y Club has thus far participated in.

Moreover, on a going forward basis, Jackson City School District can now affirmatively recognize by formal policy what it appears to have created by custom and practice—a limited public forum for secondary student clubs to display portraits of inspirational figures. *See Hazelwood Sch. Dist.*, 484 U.S. at 267 (holding that a school can create by policy a limited public forum for student clubs); *see also Kincaid*, 236 F.3d at 348–49 (same).

If the Jackson City School District did create a limited public forum, the Portrait would be private speech and could continue to hang so long as other student groups had equal access to the same limited public forum.

II. Recommendation

First, the Jackson City School Board should formally disclaim any ownership or control over the Portrait. The Portrait belongs to the Hi-Y Club, and that club alone can decide what to do with it.

Second, the Jackson City School Board should formally recognize that it created a limited public forum, and codify a policy to clarify for the student clubs the locations of the limited public fora (proposed text included as appendix). The School Board can adopt content-neutral time, place, and manner restrictions, as well as prohibit speech that is lewd or obscene, age inappropriate, or advocates criminal behavior.

Taking these steps should address the FFRF’s and ACLU of Ohio’s concerns, since the Jackson City School District would be taking “appropriate and necessary steps” to ensure that Jackson Middle School is in “compliance with the Constitution,” as well as ensuring that the displays in the limited public forum “better reflect the diversity in the community.”

III. Appendix: Proposed Policy

Jackson City School District Limited Public Forum Policy

Whereas, the Jackson High School Hi-Y Club hung a portrait of Jesus in the then-Jackson High School in 1947;

Whereas, by allowing the portrait to continue to hang since 1947, the school district has created a limited public forum by longstanding practice;

Whereas, other student groups have a right to hang portraits of inspirational figures in the same limited public forum;

Whereas, a formal policy will better enable other student groups to exercise their constitutional right to use the limited public forum;

Whereas, the Jesus portrait belongs to the Hi-Y Club, and all subsequent portraits will belong to the student clubs hanging them, with each exercising total control over whether the portraits remain hanging;

Whereas, the school district has the right to limit displays that are lewd, obscene, age inappropriate, or advocate illegal activity;

Now therefore, Jackson City Public School hereby formally recognizes a limited public forum in the fine arts hallway adjacent to the school trophy case in Jackson High School, and in the “hall of honor” foyer in Jackson Middle School, for student clubs to hang portraits of inspirational figures central to the club’s meaning and purpose. The portraits shall be no larger than 35-inches by 45-inches. Subject to the decision of the controlling student group, any presently hanging portrait can remain in its location, but all future portraits must be displayed in the school that corresponds to the given student group. The portraits must be age appropriate, cannot be lewd or obscene, and cannot advocate illegal activity.